LE COPY

Office-Supreme Court, U.S.
FILED
APR 1 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 1033

STATE OF MINNESOTA, EX REL.
ARNOLD D. BRANCHAUD,

Petitioner,

vs.

KERMIT HEDMAN, SHERIFF OF
RAMSEY COUNTY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

JOHN S. CONNOLLY
303 Degree of Honor
Building
St. Paul 1, Minnesota

Counsel for Petitioner

CApital 2-2701 — Review Publishing Co., 141 E. 5th St., St. Paul 1, Minn. — CApital 2-2701

INDEX

	PAGE
Opinion Below	1
Jurisdiction	2
Question Presented	2
Constitutional and Statutory Provisions Involved	2
Statement	3
Reasons for Granting the Writ	5
Conclusion	8
Appendix	9

AUTHORITIES CITED

	PAGE
Cases:	
Agnello v. United States, 269 U.S. 20	7
Amos v. United States, 255 U.S. 313	6
Henry v. United States, 361 U.S. 98, page 103	7
Johnson v. United States, 333 U.S. 10	6, 7
Johnson v. Zervst, 304 U.S. 458	6
Preston v. United States, 376 U.S. 364	8
State v. Harris, 121 N.W. 2d 327	6
Stoner v. California, 376 U.S. 483	8
Taylor v. United States, 286 U.S. 1	7
United States v. Jeffers, 342 U.S. 48	7
Constitution of the United States:	
Fourth Amendment	2, 4, 5
Fourteenth Amendment	2, 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. .....

STATE OF MINNESOTA, EX REL.
ARNOLD D. BRANCHAUD,

Petitioner,

vs.

KERMIT HEDMAN, SHERIFF OF
RAMSEY COUNTY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

Arnold D. Branchaud prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Minnesota entered in this case on September 25, 1964.

OPINIONS BELOW

The opinion of the Supreme Court of Minnesota (App. infra, pp. 9-15) is reported at 130 N.W. 2d 628.

JURISDICTION

The judgment of the Supreme Court of Minnesota was entered on the 25th day of September, 1964. Rehearing was denied on November 2nd, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTION PRESENTED

Whether the petitioner's right against unreasonable searches and seizures as guaranteed by the Fourth Amendment, made applicable to the states by the Fourteenth Amendment, has been violated by the search and seizure of the articles in petitioner's case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution provides in relevant part as follows:

FOURTH AMENDMENT:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

FOURTEENTH AMENDMENT:

" * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to

any person within its jurisdiction the equal protection of the laws. * * *

STATEMENT

On the afternoon of May 13th, 1961, a Mr. and Mrs. Milton Hedin left their home at 570 East Wheelock Parkway in the City of St. Paul, Minnesota, at about 5:40 p.m., for a week-end trip. On leaving they locked and secured the doors and windows. On returning home the next afternoon they found that their home had been entered, a door had been broken, articles had been strewn about the premises, a small amount of money had been taken and their television set was missing.

At about 9:02 p.m. on May 13th, 1961, petitioner was arrested by two police officers of the City of St. Paul Police Department, Officer Herbert Hoelzel and Officer Dexter. Petitioner was parked on Genessee Street about one-half block west of Mississippi Street, in the City of St. Paul.

The officers testified that the basis for the arrest was that the petitioner's car was parked in an area which had been torn down for redevelopment purposes, and that nobody would ordinarily park there. (Tr. page 17). The officers passed the street and then backed up and turned in. As they did so they noticed the lights of the parked car being turned on. As they approached the car the occupant got out and "ran around to the front and lifted the hood." (Tr. page 18). The officers inquired as to his identity and he gave his name as Arnold Branchaud and said that he was having motor trouble. The officers asked to see his driver's license and also asked him if they could check his trunk. (Tr. page 18). Officer Hoelzel said petitioner opened the trunk. (Tr. page 19). Officer Dexter testified that the trunk was opened by Officer Hoelzel.

(Tr. page 34). When the trunk was opened it was found to contain a television set later identified as the one taken from the Hedin home. "When asked where he got the television set, petitioner appeared agitated and was sweating quite profusely even though it was a cold evening, cool enough to wear a jacket." When he was asked why he was sweating, he said to Police Officer Hoelzel, "You would be scared too if you were stopped." (Tr. page 20). When asked where the television set came from, the petitioner gave three contradictory stories, apparently in rapid succession. He was then brought to police headquarters. Thereafter he was charged and convicted of the offense of burglary.

Both officers testified that at the time that they stopped petitioner's car they did not know that a burglary had been committed at the Hedin home. (Tr. page 20). The petitioner's counsel was not allowed to ask the officers whether they had a search warrant (Tr. page 21) or whether they had a report of any felony having been committed in that area (Tr. page 21). Further, petitioner's counsel was instructed not to pursue that matter any further. (Tr. page 21).

During the course of petitioner's trial on June 12th, 1961, petitioner's counsel objected to the introduction of the television set as State's Exhibit A on the grounds "it is immaterial, not relevant, no proper foundation and also on the grounds that it is evidence that should be excluded on the grounds of the Fourteenth Amendment to the Constitution of the United States and the section of the Minnesota Constitution dealing with illegal search and seizure." (Tr. page 21). Also before petitioner's trial petitioner moved to suppress the same evidence on the grounds that it was in violation of his rights under the Fourth and Fourteenth Amendments of the Constitution of the United States. Also before

trial petitioner's counsel asked the Court to certify this precise question to the Minnesota Supreme Court. After the jury returned a verdict of guilty against the petitioner, petitioner's counsel made a Motion for a New Trial or Judgment of Acquittal or for a certification to the Supreme Court of Minnesota raising this same question. A copy of this Motion is annexed hereto to the appendix.

In affirming the conviction the Supreme Court of the State of Minnesota specifically found that the search was consented to by petitioner. The Minnesota Supreme Court further found that under the conditions which petitioner was found and the contradictory stories he gave and unsuccessfully attempting to explain how he got possession of the stolen property once the trunk was opened gave the officers probable cause for his arrest and the seizure of the television set. Although the television set had not been seen until either petitioner opened the trunk pursuant to the police officer's request or until the police officer opened the trunk.

REASONS FOR GRANTING THE WRIT

The Facts State a Violation of Petitioner's Rights Against Unreasonable Search and Seizure Guaranteed by the Fourth Amendment

1. The decision of the Minnesota Supreme Court in the instant case is directly in conflict with the decision of this Court concerning the question of consent to an unreasonable search and seizure. The decisions of this Court in no way support the statements of the Minnesota Supreme Court wherein that court stated at page 631 of the Opinion below:

> "We are satisfied here that despite the apparent inconsistency of the testimony of the two police officers involved the search was consented to by defendant."

This Court stated in *Amos v. United States*, 255 U.S. 313. The prosecution has the burden of proof by clear and positive evidence that such consent was given. This Court has further stated in discussing Sixth Amendment Rights. Courts indulge every reasonable presumption against waiver of fundamental rights. *Johnson v. Zerbst*, 304 U.S. 458.

It is the right of one faced with authority to submit and to reserve his defenses for the courts. An inference of consent from a failure to engage in a discussion as to the officers' authority is not warranted. Consent cannot be found from submissiveness or the neglect or failure to argue with the police officers. In fact, intimidation and duress are almost necessarily implicit in such situations as this Court stated in *Johnson v. United States*, 333 U.S. 10, in referring to the defendant's consent for a search, "* * * it was granted in submission to authority rather than as an understanding and intentional waiver of a constitutional right."

Settlement of this question by this Court is plainly in the public interest since the Minnesota Supreme Court in the instant case and the case of *State v. Harris*, 121 N.W. 2d 327, have denied defendant's constitutional immunity from unreasonable search and seizure through the "boot strap device" of finding consent were in fact non existed.

2. The decision of the Minnesota Supreme Court is believed to be erroneous and contra to the decisions of this Court in that the search in the instant case was justified by what the subsequent arrest and seizure turn up with. This Court has consistently held that a search can only be pur-

suant to a valid warrant or incident to a valid arrest and that any other type of search is a general search and therefore "per se" unreasonable. *Agnello v. United States*, 269 U.S. 20; *Taylor v. United States*, 286 U.S. 1; *Johnson v. United States*, 333 U.S. 10; *United States v. Jeffers*, 342 U.S. 48. The Minnesota Supreme Court is attempting to state that petitioner was not arrested until he told contradictory stories in attempting to explain how he got possession of the stolen property. The Minnesta Supreme Court was clearly not following the teachings of this Court in *Henry v. United States*, 361 U.S. 98, wherein the Court stated at page 103:

> "The prosecution conceded below and inheres to the concession here, that the arrest took place when the federal agents stopped the car. That is our view on the facts of this particular case when the officers interrupted the two men and restricted their liberty of movement the arrest for purposes of this case was complete. It is therefore necessary to determine whether at or before that time they had reasonable cause to believe that a crime had been committed. The fact that afterward contraband was discovered is not enough. An arrest is not justified by what the subsequent search discloses as *Johnson v. United States*, 333 U.S. 10, 92 L. ed. 636, 68 S. Ct. 367, supra, holds."

In the instant case the police officers admitted under oath they had no idea the Hedin home had been burglarized and no reasonable cause to believe that a crime had been committed by the petitioner. If the Minnesota Supreme Court really means what it seems to say that a search was made of petitioner's car before he was arrested then we have clearly a general search which is "per se" illegal. It appears clear from the record that this is the conclusion that the Minne-

sota Supreme Court arrived at. That the search took place before the arrest because certainly the police officers had no grounds to arrest petitioner before the trunk to his car was opened and therefore the only justification for the unreasonable search would be consent which is totally absent in this case. Here we have a unique situation where first the *search* takes place, then the *arrest*, and then the *seizure*, all of which were unconstitutional. The Minnesota Supreme Court has overlooked the recent teaching of this Court in *Stoner v. California*, 376 U.S. 483, and *Preston v. United States*, 376 U.S. 364, that the search must be related to the arrest both as to the time and place.

CONCLUSION

For the following reasons this Writ of Certiorari should be granted.

JOHN S. CONNOLLY,
Counsel for Petitioner
303 Degree of Honor
Building
St. Paul 1, Minnesota

APPENDIX A

No. 149 Ramsey County Murphy, J.

39285

STATE OF MINNESOTA EX REL.
ARNOLD D. BRANCHAUD,
Relator,

vs.

KERMIT HEDMAN, SHERIFF OF
RAMSEY COUNTY,
Respondent.

Endorsed
Filed September 25, 1964
Mae Sherman, Clerk
Minnesota Supreme Court

SYLLABUS

1. Persons found under suspicious circumstances are not clothed with a right of privacy which prevents police officers from inquiring of them as to their identity and actions.

2. The right of the police to stop a person found in suspicious circumstances does not extend to a right of search in the absence of probable cause. The constitutional immunity from unreasonable searches and seizures, however, may be waived by consent or permission to make the search and seizure.

Affirmed.

OPINION

MURPHY, Justice.

This matter is before us in post conviction proceedings initiated by petition for writ of habeas corpus. Defendant was convicted of the offense of third-degree burglary. The verdict of guilty was returned by the jury on June 14, 1961. On December 7, 1961, an alternative motion for a new trial, judgment of acquittal, or certification to this court was denied and sentence imposed. The sentence was suspended and he was placed on probation for 5 years. No appeal was taken from the judgment of conviction. Proceedings were thereafter instituted in the district court to revoke probation because defendant had violated the terms of the court's order. The violation is predicated upon a subsequent conviction of defendant for the offense of attempted burglary. The conviction in the second case was on October 9, 1963, and after a denial of a motion for a new trial, a sentence of 2 to 5 years was imposed. An appeal has been taken from that judgment. This proceeding was interposed to forestall revocation of the probation order entered at the time the previous sentence was imposed and to test the validity of that sentence. Defendant claims that the evidence used to convict him in that case was the fruit of an illegal search and seizure.

Because no timely appeal was taken from the conviction in the previous case, we would not ordinarily review the asserted errors which defendant now puts forth. However, as we pointed out in State v. Mertz, —Minn. —, — N. W. (2d) —, filed September 18, 1964, recent decisions of the United States Supreme Court, Fay v. Noia, 372 U. S. 391, 83 S. Ct. 822, 9 L. ed. (2d) 837, and Sanders v. United States, 373 U. S. 1, 83 S. Ct. 1068, 10 L. ed. (2d) 148, indicate that the

principle of res judicata is inapplicable in habeas corpus proceedings. Since the issue raised relates to the asserted denial of due process under the Fourth and Fourteenth Amendments, we accordingly treat the matter as a proceeding in the nature of an application for postconviction relief and proceed to consider the error assigned.

From the fragmentary record which we have, it appears that on the afternoon of May 13, 1961, Mr. and Mrs. Milton Hedin left their home for a weekend trip. On leaving they locked and secured the doors and windows. On returning home the next afternoon, they found that their home had been entered, a door had been broken, articles had been strewn about the premises, a small amount of money had been taken, and their television set was missing. The record further shows that about 9 p. m. on the evening of May 30, 1961, two officers of the St. Paul Police Department were on patrol duty in a vacated area of the city which had been cleared for redevelopment purposes. In going through this area they noticed a car parked on a side street in a place which would not ordinarily be used for parking. They passed the street and then backed up and turned in. As they did so, they noticed the lights of the parked car being turned on. As they approached the car, the occupant got out and "ran around to the front and lifted the hood." The officers inquired as to his identity and he gave his name as Arnold Branchaud and said that he was having motor trouble. The officers asked to see his driver's license. They noticed that the trunk of the car was secured by a hasp and padlock. They asked if they could look in the trunk and he consented. One of the officers said that defendant opened the trunk. It was the recollection of the other officer that defendant voluntarily surrendered the keys to the first officer and gave him permission to open it. There is no evidence of

threats or coercion having been used to induce defendant to surrender the keys to the police or to open the trunk for them. When the trunk was opened, it was found to contain a television set, later identified as the one taken from the Hedin home. When asked where he got the television set, defendant appeared agitated and "was sweating quite profusely even though it was a cool evening, cool enough to wear a jacket." When he was asked why he was sweating, he said to the police officer, "You would be scared too if you were stopped." When asked where the television set came from, defendant gave three contradictory stories, apparently in rapid succession. He was then brought to police headquarters. Thereafter he was charged and convicted of the offense of burglary.

As far as we can gather from the record there is no claim that the television set is not the set which was taken from the Hedin home. We cannot find from the record that a motion was made to suppress the use of the television set as evidence in the trial. The error is predicated upon objection sustained to certain questions asked by defense counsel on cross-examination with reference to whether the police had knowledge of the theft of the television set at the time they accosted defendant. The specific objection to the introduction of the television set as it appears in the record is that "it is immaterial, not relevant, no proper foundation and also on the grounds that it is evidence that should be excluded on the grounds of the 14th Amendment to the United States Constitution and the section of the Minnesota Constitution dealing with illegal search and seizure."

1. In the argument before this court it appears to be the claim of defendant that the evidence used against him was the product of an exploratory search without probable cause in violation of his rights under the Fourth and Fourteenth

Amendments. It seems to be further urged that since Mapp v. Ohio, 367 U. S. 643, 81 S. Ct. 1684, 6 L. ed. (2d) 1081, police officers are not permitted to accost a suspicious character on a public street for questioning. While the Mapp case and numerous decisions recently handed down by the United States Supreme Court clearly establish that under state and Federal procedures citizens are entitled to uniform protection from unreasonable searches and seizures, we do not understand that these decisions have gone so far as to require or suggest that state police officers follow precise procedures in making arrests, searches, and seizures. The Fourth Amendment protects the individual only from "unreasonable" searches and seizures; and whether a search and seizure is "unreasonable" must depend upon the particular facts of each case.

Nor do we feel that the legality of the arrest of defendant is tainted because the police officers accosted and interviewed defendant without actual information that he was carrying stolen property in his automobile.[1] Under the circumstances here, the police officers did no more than what they were re-

---

[1] Since Mapp v. Ohio, 367 U. S. 643, 81 S. Ct. 1684, 6 L. ed. (2d) 1081, there has been considerable judicial and legislative deliberation on the right of police officers to accost and interview persons suspected of illegal conduct. So-called "stop and frisk" statutes have been enacted. New York Code of Criminal Procedure, § 180(a), discussed in 38 St. John's L. Rev. 392; 30 Brooklyn L. Rev. 274; People v. Rivera, — N. Y. (2d) —, — N. Y. S. (2d) —, — N. E. (2d) — (New York Court of Appeals, July 10, 1964); Uniform Arrest Act, enacted in Delaware, New Hampshire, and Rhode Island; Hawaii Rev. Laws 1955, c. 255, §§ 4 and 5; Mass. Ann. Laws 1961, c. 41, § 98. For general discussion of the subject, see, also, State v. Gulczynski, 32 Del. 120, 120 A. 88; Commonwealth v. Lehan, — Mass. —, 196 N. E. (2d) 840; People v. Mickelson, 59 Cal. (2d) 448, 30 Cal. Rptr. 18, 380 P. (2d) 658; People v. Mosco, 214 Cal. App. (2d) 581, 29 Cal. Rptr. 644; People v. Blodgett, 46 Cal. (2d) 114, 293 P. (2d) 57; People v. Simon, 45 Cal. (2d) 645, 290 P. (2d) 531; Cornish v. State, 215 Md. 64, 137 A. (2d) 170; Frye v. United States (9 Cir.) 315 F. (2d) 491; Green v. United States, 104 App. D. C. 23, 259 F. (2d) 180; United

quired to do in performance of their duties. In Frye v. United States (9 Cir.) 315 F. (2d) 491, 494, the court pointed out that—

> "* * * the local policeman, in addition to having a duty to enforce the criminal laws of this jurisdiction, is also in a very real sense a guardian of the public peace and he has a duty in the course of his work to be alert for suspicious circumstances, and, provided that he acts within constitutional limits, to investigate whenever such circumstances indicate to him that he should do so."

Persons found under suspicious circumstances are not clothed with a right of privacy which prevents police officers from inquiring as to their identity and actions. The essential needs of public safety permit police officers to use their faculties of observation and to act thereon within proper limits. As was said by the New York Court of Appeals in People v. Rivera, — N. Y. (2d) —, — N. Y. S. (2d) —, — N. E. (2d) — (decided July 10, 1964):

> "* * * Prompt inquiry into suspicious or unusual street action is an indispensable police power in the orderly government of large urban communities. It is a prime function of city police to be alert to things going wrong in the streets; if they were to be denied the right of such summary inquiry, a normal power and a necessary duty would be closed off."

2. Of course, the right of police to stop a suspicious person does not extend to a right of search in the absence of probable cause. It is well established, however, that the constitutional immunity from unreasonable searches and seizures may

---

States v. Vita (2 Cir.) 294 F. (2d) 524; United States v. Bonanno (S. D. N. Y.) 180 F. Supp. 71; State v. Hatfield, 112 W. Va. 424, 164 S. E. 518; People v. Henneman, 367 Ill. 151, 10 N. E. (2d) 649; Henry v. United States, 361 U. S. 98, 80 S. Ct. 168, 4 L. ed. (2d) 134; People v. Tinston, 6 Misc. (2d) 485, 163 N. Y. S. (2d) 554.

be waived by consent or permission to make the search and seizure. We are satisfied here that despite the apparent inconsistency of the testimony of the two police officers involved, the search was consented to by defendant. City of St. Paul v. Stovall, 225 Minn. 309, 30 N. W. (2d) 638; State v. Harris, 265 Minn. 260, 121 N. W. (2d) 327; Zap v. United States, 328 U. S. 624, 66 S. Ct. 1277, 90 L. ed. 1477, reversed on other grounds, 330 U. S. 800, 67 S. Ct. 857, 91 L. ed. 1259; United States v. Eldridge (4 Cir.) 302 F. (2d) 463.

It is, of course, true that the consent must be freely given without any coercion or threats and that any claim of waiver of constitutional rights must be viewed with caution. Villano v. United States (10 Cir.) 310 F. (2d) 680; Channel v. United States (9 Cir.) 285 F. (2d) 217. Here, however, there is no evidence of threats or coercion. The only testimony on the question was that the police asked if they could look in the trunk; and that defendant opened the trunk for them or gave them permission to open it. The facts in this case may be distinguished from those in the Villano case, where the police threatened to break into accused's store if he did not consent, and from those in the Channel case, where accused had been under arrest for some time and his apartment was searched in his absence. The facts in this case are similar to those in State v. Harris, *supra*, and our decision must be controlled by that authority. It seems to us that under the circumstances here the conditions under which defendant was found and the contradictory stories he told in unsuccessfully attempting to explain how he got possession of the stolen property provided the officers with probable cause for his arrest and the seizure of the television set.

It is unnecessary to consider the other points raised by defendant.

Affirmed.

APPENDIX B

EXHIBIT "D"

State of Minnesota
County of Ramsey

District Court
Second Judicial District

STATE OF MINNESOTA,

Plaintiff,

vs.

ARNOLD DUANE BRANCHAUD,

Defendant.

NOTICE OF ALTERNATIVE MOTION FOR JUDGMENT OF ACQUITTAL, OR FOR A NEW TRIAL, OR FOR CERTIFICATION TO THE MINNESOTA SUPREME COURT

To William B. Randall, Ramsey County Attorney, and Gerald Rutman, Assistant Ramsey County Attorney:

PLEASE TAKE NOTICE that the defendant, Arnold Duane Branchaud, will move the Court, in the Court House, in the City of St. Paul, County of Ramsey, State of Minnesota, on Tuesday, June 27, 1961, at 9:30 o'clock a.m., or as soon thereafter as counsel can be heard, for an Order directing that judgment of acquittal be entered in favor of the defendant and against the plaintiff on the grounds that the only evidence tending to prove the charge of burglary, third degree, was evidence which was taken through an illegal arrest

and an illegal incidental search and seizure, contrary to the Fourth, Fifth and Fourteenth Amendments of the United States Constitution.

You will further note that if the foregoing motion is not granted, that defendant at the same time and place will move for an order setting aside the special verdict and granting defendant a new trial upon the following grounds:

1. Errors of law occurring at the trial, and objected to at the time including:
   a. Admission in evidence of a television set, the subject of an illegal arrest and an illegal incidental search and seizure.
   b. Admission in evidence of a tire bar and a pair of gloves.

You will further note that if the foregoing motion is not granted, the defendant at the same time and place will move the Court for an Order certifying to the Supreme Court of Minnesota, pursuant to M.S.A. 632.10, the following:

> Where there is an illegal arrest and illegal search and seizure is evidence secured at that time incompetent and inadmissible against the defendant?

These motions will be made on the minutes of the judge.

Dated this 26th day of June, 1961.

JOHN S. CONNOLLY
Attorney for Defendant
224 Minnesota Building
St. Paul 1, Minnesota